SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
1971
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1327

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JESSE R. OLDS . . . . . Petitioner

Versus

PENNSALT CHEMICALS CORPORATION . . . . . Respondent

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## PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MAY IT PLEASE THE COURT:

### STATEMENT

Respondent's brief raises issues and this reply brief is directed to them.

### ARGUMENT

The petitioner, Olds, does not contend that the Federal District Court may never direct a verdict in

a diversity action without doing violence to the Seventh Amendment to the Constitution of the United States. Olds does contend, however, that the Court may not direct a verdict in a diversity case when there exists a question of fact material to the issue. Here, as argued before, there is a substantial question of fact. The respondent, Pennsalt, has stated in its brief that there was no evidence that the construction company was not an independent contractor. (Respondent's Brief, p. 2). In making such statement Pennsalt overlooks the language of the very contract involved which gave Pennsalt the right to discharge—which gives the right to control—which is the most important evidential element in determining whether the independent contractural relationship exists. See *Decker v. Glasscock Trucking Service, Inc.*, Ky., 397 S.W. 2d 773 (1966), page 775. Respondent then inconsistently sets out (Respondent's Brief, p. 7) that if the Supreme Court grants certiorari, then the Court will have to review the evidence to determine whether or not the relationship of independent contractor existed between Pennsalt and the construction company. While thereby admitting that the question exists, Pennsalt is apparently suggesting that the Supreme Court assume the duties of a jury in making this determination. That is what this case is all about. There is a factual question and all Olds has ever asked is that this factual question be submitted to the jury.

Pennsalt has cited no authorities controverting or even qualifying those Kentucky cases cited by Olds to the effect that the power to discharge gives the power to control and that the power to control, and not the fact of control, is the principal factor in distinguishing a servant from a contractor.

Also, the weight to give to the testimony of the respondent's construction engineer, Carnahan, and the head of Johnson Construction Company is for the jury. (Respondent's Brief, p. 7). See *Cross v. Clark*, 308 Ky. 18, 213 S.W. 2d 443 (1948):

> "The determination of the weight of conflicting evidence and of the credibility of witnesses rests exclusively within the province of the jury." (P. 446).

Whatever Pennsalt may maintain, it is a fact that the very contract itself gave Pennsalt the right to "discharge". *Cheatham v. Chabal*, 301 Ky. 616, 192 S.W. 2d 812 (1946) stated:

> "If the courts take over the prerogatives of juries by saying that substantive evidence, undisputed by physical facts or nature's laws and not dependent upon mere hypotheses of experts, is insufficient to carry common law causes before juries for their decisions, then a lethal and devastating offensive against free, republican government has begun in earnest." (P. 815).

Olds was, of course, a business invitee to whom Pennsalt owed the duty of discovering a dangerous condition. *Mackey v. Allen*, Ky., 396 S.W. 2d 55 (1965).

While it is not necessary to a determination of this case, it may be noted that Pennsalt states as a fact that no fellow employees of Olds testified that Pennsalt at any time attempted to direct the work or to tell them what to do or not to do. This statement is also belied by the record. The construction company's safety engineer, Olds' fellow employee, had given a

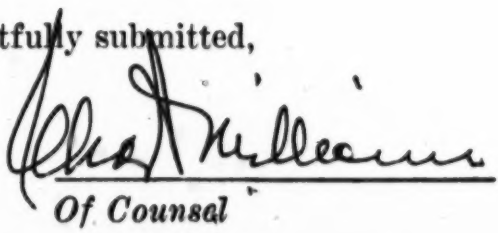
written statement setting forth directions as to safety given him by Pennsalt's construction engineer. The Trial Court excluded this as substantive testimony but the Sixth Circuit found such testimony admissible under *Jett v. Commonwealth*, Ky., 436 S.W. 2d 788 (1969). In *Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 230 S.W. 2d 103 (1950), this was said:

> "As characteristically stated by Judge Cardoza in Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425, 1427, 'It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.' " (P. 105).

## CONCLUSION

For the reasons set forth in the Petition and this Reply Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Charles A. Williams, counsel for Jesse R. Olds, in the matter styled "Jesse R. Olds v. Pennsalt Chemicals Corporation," do hereby certify that I served a true copy of the foregoing Petitioner's Reply Brief to Respondent's Brief Opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on March 22, 1971, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Thomas Marshall, Jr., Wheeler & Marshall, Attorneys at Law, Citizens Bank Building, Paducah, Kentucky 42001, counsel of record for the respondent.

CHARLES A. WILLIAMS